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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR APPELLEES

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Opinion of the Court Below

The order and opinion of the three-judge District Court below are not yet reported. The order and opinion are set forth in the Appendix, at pages 14 and 16, respectively.

Jurisdiction

A three-judge District Court convened under 28 U.S.C. § 2284, in the Eastern District of Virginia, held two Virginia statutes were unconstitutional. Jurisdiction here by appeal is based on 28 U.S.C. § 1253. This Court noted probable jurisdiction on April 26, 1976.

Statutes Involved

The text of the statutes involved which were determined to be unconstitutional is set forth in the Appendix, at pp. 114-118. Section 28.1-60 of the Code of Virginia (1950), as

amended, in essence prohibits nonresidents of Virginia from catching menhaden in the Virginia portion of Chesapeake Bay. Section 28.1-81.1 prohibits aliens, including alien-owned U.S. corporations, from obtaining a license to catch menhaden in Virginia. Violation of either statute is a misdemeanor.

The provisions of the United States Constitution involved are the Commerce Clause, Article I, § 8, cl. 3, the Supremacy Clause, Article VI, ¶ 2 and the Equal Protection Clause, Amendment XIV, § 1.

QUESTIONS PRESENTED

1. Whether U.S. enrollment and licensing of menhaden fishing vessels by domestic corporations ultimately owned by non-U.S. citizens, after approval by the Department of Commerce, can be nullified by state laws designed to exclude nonresidents and noncitizens from competing with locally based fishermen?

2. Whether corporations incorporated and resident in states outside the State of Virginia, ultimately owned by non-U.S. citizens, the vessels of which are duly enrolled and licensed in the U.S. fishery following a hearing and approval by the Department of Commerce, are deprived of the equal protection of the laws within the Fourteenth Amendment by exclusionary Virginia statutes which bar nonresidents and foreign-owned corporations from fishing for menhaden in Virginia waters?

3. Whether the attempts of the State of Virginia to exclude nonresidents from the menhaden fishery of Chesapeake Bay and exclude noncitizens from the menhaden fishery of the Bay and Virginia's marginal seas constitute an unlawful burden on interstate commerce?

4. Whether the Federal doctrine of abstention is applicable where state statutes challenged as unconstitutional admit of no saving construction by state courts and the enforcement thereof would cause immediate and irreparable injury?

STATEMENT OF THE CASE

On July 14, 1975 the Appellees filed a Complaint requesting a three-judge court to declare §§ 28.1-60 and 28.1-81.1, CODE OF VIRGINIA (1950), as amended, unconstitutional and to enjoin enforcement of said statutes. Section 28.1-60 prohibits nonresident corporations such as the Appellees from catching menhaden in the Virginia portion of the Chesapeake Bay. Section 28.1-81.1 prohibits aliens, including alien owned U.S. corporations, such as the Appellees, from obtaining a license to catch menhaden anywhere in Virginia waters. After completion of depositions by both sides and following the submission of factual affidavits and briefs to the extent desired by the parties, the District Court granted Appellees' Motion for Summary Judgment on November 7, 1975 finding both statutes to be unconstitutional and enjoined their further enforcement.

The Appellant, James E. Douglas, Jr., is the Commissioner of Marine Resources for the Commonwealth of Virginia and is charged with responsibility for enforcement of Virginia's statutes regulating commercial fisheries. Section 28.1-13, CODE OF VIRGINIA (1950), as amended.

Appellees are Seacoast Products, Inc. ("Seacoast"), a Delaware corporation duly qualified to do business in the State of Virginia, and its subsidiaries, The New Smith Meal Company, Inc. ("Smith Meal"), a Massachusetts corporation, and Second Oceanic Corporation ("Oceanic"), a New York corporation. Appellees are engaged solely in the business of fishing for menhaden and processing the catch for commercial purposes. Appellees' operations should not be confused with those of foreign fishing fleets not within the jurisdiction of the United States. Ultimate alien stock ownership of Seacoast in no way affects its obligations under laws of the United States and of the various states where it conducts its business.

The operations of Seacoast were begun in Port Monmouth, New Jersey in 1911 by J. Howard Smith. After his

death in the early 1950's, ownership of the business passed to his children and a son-in-law ("Smith Family"). The stock of Seacoast was sold by the Smith Family in December 1973 to a Delaware corporation ultimately owned by Hanson Trust Ltd., a publicly held company of the United Kingdom.

The transfer of ownership of Seacoast from the Smith Family resulted in no change in Seacoast's mode of operations. The officers and crews of its ships are U.S. citizens, as are 95% of the employees in its processing plants in various coastal states (App. 29).

Approval of Seacoast Transfer by the United States Government

The purchase of the Seacoast stock by the British-controlled Delaware corporation required the approval of the Maritime Administration of the Department of Commerce under Section 37(e)* of the Shipping Act, 1916, 46 U.S.C. § 835(e). Seacoast's and Smith Meal's menhaden fishing vessels were temporarily transferred to a nominee, Richard Reiss, a citizen of the United States pending the outcome of proceedings in the Department of Commerce on Seacoast's application to retransfer the vessels from Reiss to Seacoast and Smith Meal under Sections 9 and 37 of the Shipping Act, 1916 (46 U.S.C. §§ 808, 835).

The application for approval was submitted in January of 1974. The application clearly proposed that the vessels would be redocumented (by enrollment and licensing) as fishing vessels under the laws of the United States.

In passing upon the application, the Maritime Administration considered, among other things, the acceptability of the foreign purchaser and national defense considerations. The application proposed continued operation of the vessels under the U.S. flag. Because the application involved continued operation by an alien controlled domestic corporation, it was forwarded, pursuant to Maritime Admin-

* Section 37 applies during a period of national emergency, and therefore has been applicable since the PRESIDENTIAL PROCLAMATION No. 2914 of December 16, 1950, 15 Fed. Reg. 9029 (1950).

istration policy, to the National Oceanic and Atmospheric Administration ("NOAA") for investigation and comment.

NOAA's policy in regard to such transfers was set forth in a public statement dated October 16, 1973, 38 Fed. Reg. 29239-40 (1973),* and provides in part as follows:

> "Under present law aliens may own controlling interests in U.S. fishing companies operating U.S.-documented fishing vessels. Ownership and control of a U.S. company by foreign interests does not alter the fact that any such company is still a U.S. company and as such is subject to all U.S. laws and regulations. Consequently, the provisions of law relating to, among other things, employment and compensation of alien workers, exports and imports of products, operations of U.S.-documented fishing vessels, international agreements to which the U.S. is a party, and fishing regulations would apply to foreign-owned U.S. fishing companies.
>
> • • •
>
> NOAA will investigate and evaluate each application on its individual merits with consideration being given to, among other things, the impact of the proposed transaction on (a) conservation and management of the fisheries resources, (b) the employment of U.S. citizens, (c) U.S. consumers, (d) competition, and (e) other social and economic factors. In doing this, NOAA will review and evaluate the operational plans of the company as well as the extent of foreign investment in the particular fishery in which the company plans to operate."

After widespread public notice, public hearings on the Seacoast application were held on March 20-21, 1974 and covered the subjects with which NOAA was particularly

* The policy in effect at that time was an interim policy. A final policy, reiterating in greater detail the same considerations set forth in the interim policy, was issued September 13, 1974. 39 Fed. Reg. 33812-3 (1974).

concerned, as set forth in its policy statement, above. At the outset of the hearings, the Chairman outlined the purpose and format of the proceedings:

> "As I previously indicated, the focus of this hearing will be on the fishery aspects of the proposed transfer.
>
> We will further address such considerations as the possible effects of the transfer upon (1) the Menhaden resource involved; (2) the aggregate of fishing/processing companies on whose behalf the transfer is sought; (3) upon the Menhaden segment of the commercial fishing industry; and (4) upon consumers of fish meal, fish oil, and fish solubles which these companies have produced." (App. 31)

During the hearings, statements were offered in support of the application by various representatives of Seacoast. Its primary competitors, Zapata-Haynie Corporation ("Zapata") and Standard Products, Inc. ("Standard"), opposed the application. The hearings on the application to retransfer the menhaden fishing vessels to Seacoast and Smith Meal resulted in a favorable recommendation by NOAA to the Maritime Administration. NOAA necessarily concluded in making its recommendation that the application was consistent both with protection of the fisheries, one of its paramount concerns, and also with the United States' social and economic interests, including the effect on competition.

The Department of Commerce (through the Maritime Administration) granted the application for transfer of the vessels to Seacoast and Smith Meal and their redocumentation as United States fishing vessels, and issued Transfer Orders approving such transfers. The Department in such circumstances is authorized by law, if it grants such approval, to grant it "either absolutely or upon such conditions as the Secretary prescribes." 46 U.S.C. § 839. The approval was granted *unconditionally*.

After the Department of Commerce issued its Transfer Orders, the vessels were redocumented (by enrollment and licensing) as fishing vessels of the United States.

Upon enrollment, they were "deemed vessels of the United States entitled to the privileges of vessels employed

in the . . . fisheries." 46 U.S.C. § 251(a). As such vessels of the United States, they were entitled to "engage in the fisheries within the territorial waters of the United States." 16 U.S.C. § 1081.

Commercial Menhaden Fishing in the United States

Menhaden is a commercially valuable species of inedible fin fish. (App. 24) It is the leading species of fish caught for industrial use and, in terms of landed tonnage, the menhaden industry is the largest fishery in the United States. The catch of menhaden is processed into fish meal, fish oil and fish solubles. Fish meal is used primarily for poultry feed; fish solubles for animal feeds. Fish oil is used domestically for industrial purposes and also is exported to Europe and Canada where its use in the manufacture of margarine is permissible. Fish meal is also used by pharmaceutical companies in the manufacture of antibiotics. (App. 24)

Menhaden are migratory finfish.* The harvest of menhaden is comprised mostly of stocks that have migrated

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* The migratory nature of menhaden along the Atlantic coast was discussed as early as 1877. See UNITED STATES COMMISSION OF FISH AND FISHERIES, REPORT OF COMMISSIONER FOR 1877, APPENDIX A, *The Natural and Economical History of the American Menhaden*, at 39, which states in part as follows:

> "At the approach of settled warm weather the schools make their appearance in the coast waters. They remain in the bays and near the shores until they are warned away by the breath of coming winter. The date of their appearance is earlier in the more southern waters, and the length of their sojourn longer. . . . There is always a balance in favor of earlier arrivals at the more southern localities. Thus, it becomes apparent that the first schools appear in Chesapeake Bay in March and April, on the coast of New Jersey in April and early May, and on the south coast of New England in late April and May, off Cape Ann about the middle of May, and in the Gulf of Maine about the latter part of May and the first of June. Returning they leave Maine in late September and October, Massachusetts in October, November, and December, Chesapeake Bay in December, and Cape Hatteras in January."

See also the depositions of experts in this case (testimony of Dr. W. Jackson Davis, Assistant Director of the Virginia Institute of Marine Science, App. 75-83, and Robert Chapoton, a specialist in menhaden research employed by the National Marine Fishery Service, App. 93-99).

across the waters of the coastal states. (App. 32) Female menhaden begin their reproductive period at age three. (App. 98) The newly spawned menhaden swim to estuaries along the nearest coastal waters of the Atlantic seaboard from the Florida coast to Maine. (App. 87, 94) Thus, depending on the area where they are spawned, the young fish enter estuaries of the South Atlantic States, or the Middle Atlantic States including Chesapeake Bay, or the North Atlantic States. (App. 94)

Menhaden spend most of their life cycle close to shore although they generally spend the winter months in deep water off the South Atlantic coast from Cape Hatteras to Florida. (App. 32) Many juvenile menhaden travel south prior to their first winter,* although there is believed to be some overwintering by young fish in the estuaries they first entered. (App. 74-75, 95) Such overwintering is more frequent in estuaries in coastal states south of Virginia than in Chesapeake Bay and less frequent in estuaries north thereof. (App. 88, 102)

In March of each year menhaden begin a northern migratory movement travelling in inshore waters in large, tightly packed schools. The younger fish do not travel as far north as the oldest which go beyond Cape Cod. (App. 32) In the early fall, menhaden reverse their migratory path and return south moving offshore by January. (App. 32, 75-83, 93-99) This completes their annual cycle.

The composition by age group of the annual catch reflects the migratory nature of menhaden and the interdependence of the menhaden fisheries off all Atlantic coastal states. In recent years, age two menhaden dominated landings along the entire Atlantic seaboard including Chesapeake Bay. (App. 112) Age one fish comprised a greater

* Fish tagged as juveniles in Chesapeake Bay and in waters north thereof have been later captured as one year olds as far south as Florida waters. (App. 74)

percentage of the South Atlantic catch than that of the Chesapeake Bay area. National Marine Fisheries Service, Report to The National Fish Meal and Oil Association, March 15-17, 1976, at 7-8. Older fish, age three and older, were more prevalent in catches in areas north of Chesapeake Bay. (App. 111-112) Virginia's interest in the management of the stock of menhaden off its shores parallels that of all the Atlantic coastal states. Each fishery is dependent on the unit population travelling throughout the Atlantic range. The repopulation of a particular menhaden fishery, whether off the shores of Virginia or any other coastal state, depends upon reproduction by female menhaden three years old or older. (App. 99)

Commercial fishing for menhaden is conducted during the summer migratory period when the fish remain close inshore and travel in large, thickly packed schools on or near the surface. (App. 24) This contrasts with the winter months when menhaden are dispersed off-shore in deep water and stay away from the surface. (App. 24, 75) It is not feasible to fish for menhaden commercially except within the three mile limit where the great bulk of menhaden are captured. In 1975, approximately 95% of the United States commercial catch of menhaden was taken within three miles of the coast.* U.S. Dept. of Commerce, Fisheries of the United States, 1975, Current Fisheries Statistics No. 6900 (1976), at 18.

Commercial fishing for menhaden is accomplished by using a net known as a purse seine which surrounds the school of menhaden and is drawn closely at the bottom, trapping the fish. (App. 33)

The 1975 menhaden catch of approximately 1.9 billion pounds constituted 44% of the total commercial landings of all fish by United States fishing craft that year. The raw catch of that species had a value of approximately

* Since foreign flag vessels are not permitted to fish within United States waters, they are not a factor in the menhaden fishery.

$39,300,000; its processed value was approximately $80,600,000. U.S. DEPT. OF COMMERCE, FISHERIES OF THE UNITED STATES, 1975, *supra* at 18-19, 37.

Appellees Seacoast and its subsidiaries, and their predecessors have, over the years, caught substantial amounts of menhaden within Virginia waters and in so doing have lawfully applied for and received licenses for such activities from the Commonwealth of Virginia until the enactment of the 1975 legislation hereinafter referred to. (App. 4, 37)

The three major menhaden fishing companies in the United States in the order of size are Zapata, Seacoast and Standard. Unlike Seacoast, the other two companies have plants in Virginia, are engaged in the processing of menhaden in that state and they are not alien owned. (App. 28) Zapata, unlike Seacoast is also engaged in fishing for species other than menhaden.

Seacoast operates processing plants in New Jersey and Louisiana, it has fishmeal terminals in Delaware and Texas and a shipyard in Louisiana and Maryland* (App. 5); Zapata has "shorebases for fishing vessels, plants and offices located in Virginia, North Carolina, Maryland, Mississippi, Louisiana, California and Puerto Rico"** and Standard has plants in Virginia, North Carolina and Mississippi***.

Exclusionary Legislation

After approval by the Department of Commerce of the transfer of the fishing vessels to Seacoast and Smith Meal,

* In earlier years Seacoast's predecessor company had plants in Virginia and fished in Chesapeake Bay.

** Statement of Paul L. Kelley, Vice President—Administration, Zapata, before the House of Representatives Committee on Merchant Marine and Fisheries, November 21, 1974, at 1-2.

***Statement by H. R. Humphreys, Jr., President of Standard, before the House of Representatives Committee on Merchant Marine and Fisheries, November 21, 1974, at 1.

a Virginia congressman, Hon. Thomas N. Downing, in late 1974, introduced a proposed Federal bill, H.R. 17048, 93rd Cong., 2d Sess., (1974), to forbid licensing of U.S. flag fishing vessels by a corporation if more than 25% of its stock were owned by aliens. This bill, which was introduced by Congressman Downing at Zapata's request, would have banned Seacoast from all menhaden fishing. Officials of the State and Treasury Departments opposed H.R. 17048 on the grounds that it would conflict with the efforts of the United States to promote the free flow of international investments and would impede efforts of the United States to achieve agreements with other nations regarding fisheries conservation.* H.R. 17048 failed to obtain committee approval and died.

Zapata then had a bill introduced into the Virginia legislature in 1975 which was similar in effect to the defeated bill, H.R. 17048; it excludes any fishing by aliens, including alien-owned corporations, in Virginia waters. (App. 59-60) The Virginia General Assembly passed the bill, without notice, as special "emergency" legislation, a statute ultimately embodied in § 28.1-81.1 of the CODE OF VIRGINIA (1950), as amended. (App. 62-63)

It was conceded by Appellant James E. Douglas, Jr., Commissioner of Virginia Marine Resources, who is responsible for enforcing § 28.1-81.1, that the bill was limited in its effect to Seacoast and its subsidiaries and no one else. (App. 58-60) Appellant also testified that the bill was not designed to have a beneficial effect on the fisheries in Virginia or the United States. (App. 59-60) Additionally, Appellant acknowledged that this enactment would not prevent domestic menhaden corporations from engaging in predatory fishing practices. (App. 57, 59) Appellant could think of no reasons why the bill was treated as special

* Statement of John A. Bushnell, Deputy Assistant Secretary of the Treasury, *infra* p. 34; Statement of Richard J. Smith, Director, Office of Investment Affairs, Department of State, *infra* p. 35.

"emergency" legislation other than to speed up the enactment in order to prevent Appellees from obtaining a license for the 1975 menhaden fishing season. (App. 63)

In May 1975 Appellee Smith Meal applied to the Virginia Marine Resources Commission for Virginia menhaden fishing licenses. (App. 34) The applications were rejected. The Commission wrote Smith Meal that such licenses were not available to corporations, such as Smith Meal, controlled directly or indirectly by foreign interests, under § 28.1-81.1 of the CODE OF VIRGINIA (1950), as amended. (App. 34)

In addition to the new § 28.1-81.1 which would exclude Appellees from fishing for menhaden in any Virginia waters, whether coastal or inland, that state has, for many years, forbidden *nonresident* fishermen, individual and corporate, from fishing for menhaden within the Virginia portion of Chesapeake Bay, § 28.1-60(3), CODE OF VIRGINIA (1950), as amended.*

Appellees, by virtue of this statute, are precluded from pursuing menhaden into Chesapeake Bay simply because they are not Virginia corporations. The practical effect of this legislation is the prevention of menhaden fishing in these waters by only one major commercial fisher, Seacoast and subsidiaries, which in turn are the only real competitors of the Virginia menhaden fishing corporations, Zapata and Standard. (App. 28, 59, 108)

The origin of the prohibition against nonresidents fishing for menhaden in Virginia waters dates back to 1871.

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* Violations of VIRGINIA CODE § 28.1-60(3) and § 28.1-81.1 constitute misdemeanors under § 28.1-60(6) and § 28.1-187 of such CODE, and the Commissioner of Marine Resources, any member of such Commission, all inspectors, police captains and other employees designated by the Commissioner in the service have the power, with or without warrant, to arrest any person or persons violating any of the fish or shellfish laws, and to seize any vessel, boat, craft, motor vehicle, conveyance or other thing used in such violation. § 28.1-185, CODE OF VIRGINIA (1950), as amended.

Laws of Virginia, Acts of Assembly of 1871, Chapter 182. No conservation purpose was recited in the statute, which originally also barred nonresidents from even erecting a plant in Virginia to process menhaden wherever caught. Apparently, the Virginia statute originated as discrimination against nonresidents because of their status as such.*

The 1871 statute as thereafter amended was relaxed as against nonresidents for the first time by a 1938 amendment which removed the total ban against nonresidents fishing for menhaden in Virginia waters but still prohibited nonresidents from such fishing in Chesapeake Bay. Laws of Virginia, Acts of Assembly of 1938, Chapter 199. That amendment required disclosures from nonresidents to insure that ". . . none of the laws of the State *designed to prohibit non-residents from fishing* . . . . will be violated or evaded" by the granting of a nonresident fishing license. (Laws of Virginia, Acts of the Assembly of 1938, Chapter 199, Section 3179) (emphasis added).

As noted above, the District Court held both the citizenship statute (§ 28.1-81.1) and the nonresident statute (§ 28.1-60) to be unconstitutional.

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* THE UNITED STATES COMMISSION OF FISH AND FISHERIES, REPORT OF THE COMMISSIONER FOR 1877, APPENDIX A, *The Natural and Economical History of the American Manhaden,* at 117 states:

> "The Quinnipiac Fertilizer Company, of New Haven, inaugurated menhaden fishing in North Carolina and Virginia in 1866. Their prospecting party passed the winter in Roanoke Sound and established weirs for the capture of menhaden, which were there very abundant. They were, however, driven away by the natives, whose jealousy of strange fishermen led them to tear up their weirs. They then located themselves near Cape Charles. Four companies established factories here—one from Maine, one from Long Island, and two from New London. They found the fishery very good, although the fish produced little oil, and were only adapted for the manufacture of fertilizers. The laws of Virginia do not encourage the inauguration of such enterprises by strangers, and the following year it was thought unadvisable to continue the business.

SUMMARY OF ARGUMENT

1. Historically, Appellees' vessels were enrolled in the United States fishery and carried the United States flag. These vessels pursued menhaden as those fish moved in schools in their migratory routes along the coastal waters and bays of the Atlantic coast. When corporate ownership of Appellees was acquired by a corporation of the United Kingdom, Appellees were required to obtain approval of the Department of Commerce in order that their vessels might continue to be owned by Appellees and operated in the United States fishery under the United States flag. After hearings at which Appellees' competitors appeared and objected, and at which, among other factors, the effects on competition and conservation of fisheries were considered, approval was granted. The existence of a comprehensive Federal system which was used for the enrollment and licensing of Appellees' vessels preempts any right of Virginia to adopt and enforce legislation which would exclude Appellees from waters subject to that state's jurisdiction. Appellees do not claim they are immune from valid regulatory measures of Virginia applicable to all vessels fishing for menhaden in its waters, such as statutes regulating the size of nets, for example. Appellees' position is more narrowly defined: they concede Virginia has wide latitude to adopt reasonable conservation measures applicable to all, but they deny Virginia has the right to exclude from its fishery vessels duly licensed to fish by the United States government and legally entitled to sail under the United States flag, solely because the Appellee corporate owners of such vessels are nonresidents of Virginia and are themselves owned by aliens.

2. The Virginia statutes challenged here intrude into the area of international affairs reserved exclusively for the Federal government. International economic policy is determined solely at the Federal level. The established

policy of the United States has been to favor free flow of international investments. Virginia's attempt to exclude foreign owned United States corporations and thereby deprive their alien owners of the value of their investment in the United States runs counter to United States policy and is inconsistent with the determinations of the Department of Commerce that Appellees' vessels are entitled to continue to fish for menhaden within United States waters. Such attempt would also inhibit the ability of the Federal government to obtain international agreements regarding fishery conservation.

3. The Equal Protection Clause of the Fourteenth Amendment to the Constitution protects Appellees from the invidious discrimination that results from the attempt of Virginia to exclude Appellees' vessels from the Chesapeake Bay and the coastal waters of Virginia solely because Appellees are nonresidents of the state and are foreign owned. No reasonable basis for such arbitrary classification has been or could be shown.

4. Virginia's refusal to grant Appellees a license to take menhaden in Virginia waters imposes an unlawful and discriminatory burden upon interstate commerce. The fish, the vessels that catch them and the men on board all move in interstate commerce. Upon landing the fish are processed and the products continue to move in interstate commerce. Within the proper limits of state concern, Virginia may regulate the menhaden fishery in its waters, but it is not free to monopolize the fishery for the benefit of residents of Virginia and citizens of the United States.

5. There was no basis for the Court below to abstain from the exercise of its jurisdiction. The facts were fully developed and show there was no need to refer any questions to the Courts of Virginia for interpretation of state law.

Under the statutes challenged, the Appellant was obliged to deny Appellees' application for a license to catch menhaden. The familiar principles of abstention have no application in these circumstances, particularly where the immediate and irreparable harm to Appellees resulting from the deprivation of a license was plainly shown.

ARGUMENT

Introduction

In light of the position taken by Appellant and the various *Amici,* it seems necessary to restate the essential issues of this case as distinguished from the variety of extraneous questions presented by our opponents. This case presents essentially two questions:

(a) Can Appellees be excluded from Virginia waters because ultimately they are owned by a corporation of the United Kingdom?

(b) Can Appellees be excluded from Virginia waters because they are not corporate residents of Virginia?

Our opponents, however, attempt to disguise the legislation in question, which is in fact nothing more than an effort by local Virginia fishermen to obtain a monopoly for themselves, as a conservation measure needed to preserve a valued natural resource against supposed depredations of irresponsible foreigners and in fact all non-Virginians. There is no basis in fact for Appellant's arguments. And Virginia's interest in menhaden is no different in kind from those of the various other Atlantic coastal states visited by these fish in their annual migration.

Appellant's claims are afterthoughts unsupported by the record. Appellant himself testified as to the origin of the statutes held unconstitutional below and made no pretense of suggesting that Appellees' application for a

license presented any threat to the preservation of the menhaden fishery in Virginia. Virginia imposes no limit on the size of the catch or the number of boats used in its waters. There is no reason to suppose that the size of the catch ultimately will be decreased as a result of exclusion of Appellees' vessels. There is, however, every reason to suppose that Appellees' competitors in Virginia will profit as a result of their successful efforts to persuade the Virginia legislature to exclude "foreigners" from their waters.

Although Appellant had every opportunity to put in evidence any material which would justify Virginia's asserted right to exclude aliens and nonresidents, no such evidence was presented even in general terms, and there was certainly no evidence that Appellees in particular posed any threat to any valid conservation interest of Virginia. Appellees have never claimed that they are immune from reasonable nondiscrimatory state regulations while fishing in Virginia waters, but they do claim that Virginia has no right to exclude them from that fishery.

I

Under Accepted Standards of Supremacy and Preemption a State May Not Preclude Duly Enrolled and Licensed U.S. Flag Vessels from Fishing in Its Waters on the Basis of the Residence of Their Owner or the Nationality of the Shareholders of Their Owner.

As determined by the District Court, Federal law conclusively establishes that Appellees, although foreign owned, are entitled to fish in Virginia waters with their U.S. flag fishing vessels on the same basis as all other owners of U.S. flag fishing vessels. This question has been preempted by a comprehensive system of Federal statutes providing for the enrollment of such vessels and licensing them for fishing. These statutes, dating from 1792 and augmented and modified from time to time, both

license fishing and regulate in detail the nationality and ownership requirements for vessel owners.

Federal licensing alone defeats Virginia's efforts to exclude Appellees' vessels on grounds of nonresidence and foreign ownership, because such criteria would negate the Federal authority. This result Federal supremacy will not permit. In the words of *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 210 (1824), the Virginia statutes "come into collision with an act of congress" and deprive a Federal licensee of a right to which the act entitles it. This proposition is discussed in Point A below. In Points B and C Appellees argue more narrowly that the Virginia statute which excludes fishing by corporations owned by aliens (Section 28.1-81.1) must fail because it conflicts with specific Federal statutes prescribing the nationality requirements for owners of licensed U.S. flag fishing vessels, and because it intrudes into the area of foreign affairs.

Appellees, however, emphatically do *not* contend that the Federal statutes preempt the power of the states to regulate fishing in their waters in such other manner as they may deem necessary if it is consistent with the Constitution and applicable law. Nor did the opinion of the Court below hold that Federal statutes had such effect. The Appellant's and the *Amicus* brief of Appellees' competitor Zapata and certain other seafood processors (the "Competitor's brief") argue that the District Court's decision holds that 16 U.S.C. § 1081 preempts all power of Virginia with respect to fishing in its territorial waters. This misunderstanding may also have prompted the filing of *Amicus* briefs by certain of the states. Appellees stress, however, that invalidation of all state regulation of fishing is not an issue in this case. Taken in its context, the Court's holding was merely that 16 U.S.C. § 1081 preempted the power of Virginia and every other state to declare that some owners of licensed United States fishing vessels may fish in its waters but

others may not because of the nationality of their shareholders.

For this reason, large parts of the arguments of the Appellant and the *Amici* are beside the point. The Appellees do not argue that the Federal statutes which have preempted the Virginia statutes in question either deny the states the authority conferred by the Submerged Lands Act, 43 U.S.C. § 1311(a), to manage and administer the natural resources in their territorial waters, or conflict with the Contiguous Fishery Zone Act, 16 U.S.C. § 1094, the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64, or the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1856(a), which specifically preserve, but do not expand, such powers.

For the same reason, the Appellees have no quarrel with any of the cases the Appellant and the *Amici* rely upon; *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891); *Smith* v. *Maryland,* 59 U.S. (18 How.) 71 (1855); and *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960). These cases recognize the power of states to regulate the manner in which the activities of licensed United States vessels are conducted: the kinds of nets, seines, scoops, drags, and other equipment which can be used for fishing in the first two cases and smoke emission by vessels in *Huron.* This Court held that even though the vessels in question were licensed, the states had the power to enact the challenged legislation. As the Court said in *Huron,* the state regulations were "the normal incidents of local police power not constituting a direct regulation of commerce," 362 U.S. at 447. Unlike the statute invalidated in *Gibbons,* and the statutes in this case, such state regulations did not completely and permanently prevent certain Federal licensees from carrying on their licensed activity. And unlike the Virginia citizenship statute the matters regulated by the states in those cases were not already covered by contrary Federal statutes.

A. Appellees by virtue of their licenses under 46 U.S.C. §§ 251 and 263 have authority to fish for menhaden in state waters, including Chesapeake Bay, which may not be precluded by Sections 28.1-60 and 28.1-81.1 of the Virginia Code.

1. The licenses granted to Appellees' vessels authorize Appellees to fish in state waters.

The Federal licensing statutes, 46 U.S.C. §§ 251, 263, grant to Appellees' vessels, and to all other vessels similarly licensed, whether owned by citizens or by alien-owned U.S. corporations, an equal authority to fish in all navigable waters. Appellees recognize, however, that in authorizing fishing, Congress did not intend to preempt every kind of regulation of fishing, and that the Federal government has left to the states broad regulatory power over fishing within their waters. In the exercise of that power, a state may adopt reasonable and even-handed measures (including its own licensing measures) to regulate the manner in which licensed fishing vessels conduct their operations. But the exact range of state power does not have to be determined in this case because Virginia has clearly over-reached its power. For, clearly, in licensing fishing vessels the Federal government did not intend that the states should be able to nullify those licenses by prohibiting the activity which they authorize. This is what the Virginia statutes would do by excluding completely and permanently particular classes of licensed owners of U.S. flag fishing vessels.

The proposition asserted in the Appellant's and Competitor's briefs, that the licensing statutes do not license fishing but merely identify a vessel's use, is wrong, and it has been clear that it is wrong since *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). This Court held in *Gibbons* that a New York statute, which granted a monopoly to certain persons for navigating state waters with vessels moved by fire or steam, unlawfully prevented steamboats licensed for the coasting trade from exercising the privileges and authority which their Federal license granted. Accordingly, §§ 28.1-60 and 28.1-81.1 of the VIRGINIA CODE (1950), as

amended, which purport to prohibit Appellees' vessels from exercising their Federal privilege and authority to fish on the basis of Appellees' nonresidence in Virginia and foreign ownership, are invalid.

Each of Seacoast's vessels is enrolled and licensed. The language of the license is prescribed by 46 U.S.C. § 263 and reads:

> "License is hereby granted for said vessel to be employed in carrying on the Mackerel Fishery for one year from the date hereof and no longer."*

Under 46 U.S.C. § 251(a), vessels which are both enrolled and licensed (and certain vessels which are licensed):

> "and no others shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries."

In discussing a license granted for the coasting trade pursuant to the statutes quoted above, Chief Justice Marshall in *Gibbons* said:

> "The first section [46 U.S.C. § 251(a)] declares, that . . . vessels, enrolled as described in that act, and having a license in force, as is by the act required, 'and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade.' This section seems to the court to contain a positive enactment, that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe

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* For the purpose of licensing, the mackerel fishery includes the menhaden fishery. 46 C.F.R. § 67.07-13(b).

these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act.

The fourth section [46 U.S.C. § 263] directs the proper officer to grant to a vessel qualified to receive it, 'a license for carrying on the coasting trade,' and prescribes its form. . . . [T]he operative words of the instrument are, 'license is hereby granted for the said steam-boat Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.' These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself. *The word 'license,' means permission or authority; and a license to do any particular thing, is a permission or authority to do that thing; and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize.* . . . The license must be understood to be what it purports to be, a legislative authority to the steam-boat Bellona, 'to be employed in carrying on the coasting trade, for one year from this date.' " 22 U.S. (9 Wheat.) at 212-213 (emphasis added).

No doubt, as discussed below, Federally licensed fishing or coastwise trade is subject to reasonable state regulation. But there can also be no doubt that such Federal licenses in fact authorize such fishing and trade, and that any state regulation must not defeat the rights granted.*

*Since *Gibbons*, an amendment to 46 U.S.C. § 263 eliminates any doubt and fully confirms that Appellees' licenses give them an affirmative right to fish. The amendment was enacted to allow vessels to procure a consolidated license for both the coasting trade and the fisheries, as the earlier statute had been interpreted to allow licenses either for the coasting trade or the fisheries, but not both. *H.R. Rep. No. 2288, 74th Cong., 2d Sess. (1936); S. Rep. No. 1958, 74th Cong., 2d Sess. (1936).* Under the amendment and the present statute:

". . . vessels . . . licensed for the 'coasting trade and mackerel fishery' . . . shall be deemed to have sufficient license for engaging in the coasting trade and *the taking of fish of every description,* . . ." 46 U.S.C. § 263 (emphasis added).

2. The Federal government has the power to grant a license to fish in state waters.

Neither 46 U.S.C. § 251 nor § 263 makes any distinction between the high seas, the territorial sea of the United States or inland waters or otherwise limits in any way the fishing rights they grant. Moreover, since the Court in *Gibbons* construed the antecedents of § 251 and § 263 to override a state statute governing the territorial waters of New York, it is apparent that such sections grant the right to engage in fishing or the coasting trade in state waters.

Appellant implies that the Federal government does not have the power to license fishing within the territorial waters of the states. Appellant contends that the statutes licensing fishing are based solely on Congressional power over commerce and cites *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), for the proposition that Federal power over commerce does not extend to the regulation of the taking of fish. Appellant also cites *Toomer* v. *Witsell,* 334 U.S. 385 (1948), for the proposition that the taking of fish occurs before the fish have entered the stream of commerce.

Appellant misreads both *Manchester* and *Toomer*. *Manchester* holds that since Congress had not regulated an aspect of fishing (the equipment used in taking menhaden), Massachusetts was still free to do so. It did not hold that Congress lacked the power to regulate and still less did it hold that Congress could not authorize fishing in state waters. The final two paragraphs of the opinion read:

"The pertinent observation may be made that, as Congress does not assert, by legislation, a right to con-

trol pilots in the bays, inlets, rivers, harbors, and ports of the United States, but leaves the regulation of that matter to the States, *Cooley* v. *Board of Wardens,* 12 How. 299, so, if it does not assert by affirmative legislation its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays.

We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State." 139 U.S. at 266.

The question of a state's right to tax the taking of fish, as in *Toomer,* is of slight relevance to the question of whether the taking of fish is related closely enough to interstate commerce to support Federal licensing. That it is so related can hardly be doubted. As discussed more fully below, the capture, processing, transportation and sale of menhaden affect interstate commerce in many ways, any one of which would support the Federal licensing statutes. *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964).

More directly to the point, the Court of Appeals for the Ninth Circuit in *Anderson* v. *Mullaney,* 191 F.2d 123 (9th Cir. 1951), *aff'd on other grounds,* 342 U.S. 415 (1952), concluded that the movement of the fishermen themselves to the Alaska salmon fishery involves interstate movement and commerce. This holding is particularly pertinent because it is fishermen and fishing vessels that are licensed by the Federal licensing statutes.

Quite apart from commerce, however, Appellant cannot sustain the proposition that the United States lacks the power to license fishing vessels to fish in state waters. *United States* v. *California,* 332 U.S. 19 (1947), should be completely dispositive of the question since it held that the Federal government has always had paramount authority over the territorial seas and the natural resources within them. This holding has been frequently reaffirmed by this Court as having been unaffected by the Submerged Lands Act, 43 U.S.C. §§ 1311-15, which constituted an exercise and not a repudiation of the Federal power. *United States* v. *Maine,* 420 U.S. 515 (1975).

3. The Virginia statutes do not constitute reasonable regulation but are discriminatory and exclusionary in direct conflict with Appellees' rights under Federal law.

The Appellant's and the Competitor's briefs argue that *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), *Smith* v. *Maryland,* 59 U.S. (18 How.) 71 (1855), and *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), demonstrate that Federal licenses for fishing do not constitute a grant of a right to fish.

In fact, however, these cases establish only that notwithstanding Federal licensing the states retain the power to regulate fishing and the coasting trade in state waters if they do so in a reasonable and non-discriminatory way, and if other Federal law has not already regulated the same matter. It is obvious, however, that the Virginia statutes do not constitute that kind of regulation. Completely prohibiting certain licensees from carrying on their licensed activities is not comparable to regulating the manner in which licensed activities are conducted, and indeed can hardly be called "regulation" at all.

As discussed *supra* at 19-20, the statutes considered in *Manchester, Smith* and *Huron* applied even-handedly to

all Federal licensees and could be complied with by all Federal licensees. The Virginia statutes by contrast are of the kind that was held unconstitutional in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). There was no way in that case that those not granted the monopoly could qualify under the New York statute to carry on the coasting trade for which they had a Federal license. Similarly, in the present case Appellees, although licensed and authorized to engage in fishing by the United States, are prohibited from doing so by the Virginia statutes containing residence and citizenship requirements they cannot meet. Much less serious limitations on the exercise of a Federal license have been held unconstitutional. See *Harman* v. *Chicago,* 147 U.S. 96 (1893). Under these circumstances the exclusionary Virginia legislation must be invalidated.

B. The enrollment and licensing statutes (46 U.S.C. §§ 11, 251, 252, 263), Sections 9 and 37 of the Shipping Act, 1916 (46 U.S.C. §§ 808, 835), the Bartlett Act (16 U.S.C. § 1081) and the Fishery Conservation and Management Act of 1976 (16 U.S.C. §§ 1801-82) constitute a comprehensive Federal legislative scheme that preempts the Virginia statute (Section 28.1-81.1) prohibiting vessels from fishing because of the nationality of the stockholders of their corporate owners.

A comprehensive scheme of Federal legislation completely regulates the nationality of the owners of U.S. flag vessels, including fishing vessels, and it is clear "that Congress left no room for the State[s] to supplement" the Federal scheme. *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 229-230 (1947). Congress has thoroughly considered and precisely determined the extent to which United States and foreign interests may participate in the ownership of vessels licensed by the United States for the fishing trade. In doing so, Congress has done what it had not done in *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891). There Massachusetts was entitled to regulate the kinds of nets

and seines to be used in menhaden fishing because Congress had not done so. Here, however, Congress has explicitly controlled the matters which Virginia has also attempted to control. United States law has occupied this field and Virginia's inconsistent statute cannot supersede it.

1. Historic development.

The documentation statutes originated in the Acts of December 13, 1792, 1 Stat. 287, and February 18, 1793, 1 Stat. 305—307, and are now codified in 46 U.S.C. §§ 11, 251, 252, 263. Under these documentation statutes, U.S. flag vessels are documented in two categories: (1) those registered and (2) those enrolled and licensed or simply licensed. Generally, the purpose of a register is to declare the nationality of a vessel and to authorize it to engage in *foreign* trade. The purpose of an enrollment and license is to declare the nationality of a vessel and to authorize it to engage in *domestic* trade. An enrolled vessel may obtain a license to engage in fishing or in the coasting trade or in both.* 46 U.S.C. §§ 11, 251, 263.

The registration of a vessel for the foreign trade and the enrollment of a vessel for the coasting trade or fisheries, establish its "American character" entitling it to the privileges of a vessel of the United States engaged in those trades. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 214. In other words, the tests for ascertaining the "American character" of the owner of a vessel are for the purpose of determining whether such owner is sufficiently "American" to be granted the privileges and authorizations which Congress extends by registering or enrolling and licensing its vessels.

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* Both registered vessels and enrolled and licensed vessels may engage in fishing, 19 C.F.R. § 4.96(c) (1975); *Pacific Shrimp Company* v. *United States Dept. of Trans.,* 375 F. Supp. 1036, 1039 (W. D. Wash. 1974), and all such vessels are vessels of the United States, entitled to the benefits and privileges thereof. 46 U.S.C. §§ 221, 251.

Throughout the history of the documentation statutes, Congress has been acutely aware of and has given careful attention to the question of the ownership by aliens of vessel owning corporations.* With the Merchant Marine Act, 1920, Congress imposed a requirement that corporations operating vessels engaged in the coastwise trade must be 75% owned by United States citizens. 46 U.S.C. §§ 802, 883. When it adopted that Act Congress was urged by the Shipping Board to take more stringent measures regarding alien stock interest in U.S. flag vessels. S. Rep. No. 543, 66th Cong., 2d Sess. (1920). Congress, however, declined to do so and even declined to extend the requirement of 75% United States citizen ownership to fishing vessels or vessels engaged in foreign trade.

In 1959, Congress amended the documentation statutes to make clear that United States corporations with a limited number of foreign directors could document their vessels

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* At one time, Federal law did preclude corporations with alien stock ownership from documenting vessels for fishing and other purposes. Act of March 13, 1825, § 5, 4 Stat. 129. However, in 1858 Congress eliminated the prohibition on alien stock ownership while leaving unaffected the prohibition on direct foreign ownership of vessels. Act of June 11, 1858, 11 Stat. 313. The history of these amendments is summarized in the Senate Report accompanying a proposed amendment to the documentation statutes:

> "From 1825 to 1858, by administrative determination, a corporation could not document vessels unless United States citizens owned 100 percent of the stock. In 1858, the 1825 law was amended so that United States corporations with alien stockholders could document vessels and operate them in foreign or domestic trade. The Panama Canal Act of 1912 further amended the law and authorized the registration of a vessel not more than 5 years old "wherever" built, which is (a) 100 percent American-owned or (b) owned by a corporation whose president and managing directors are United States citizens." *S. Rep. No. 2145, 85th Cong., 2d Sess. (1958).*

The Panama Canal Act referred to in the foregoing quotation established the criteria for citizenship until the amendment in 1959 referred to in the text.

for the coasting trade, foreign trade or the fisheries. The accompanying Senate Report shows that Congress reconsidered the question of foreign ownership of United States vessel owning corporations and made a decision not to change the law which permitted such corporations to document vessels:

> "The question of ownership of corporations is not affected to the slightest degree by the provisions of the bill." S. Rep. No. 728, 86th Cong., 1st Sess. (1959).

At the present time the tests for the "American character" of a vessel registered for the foreign trade or enrolled for the fisheries are prescribed by 46 U.S.C. §§ 11 and 252. These Sections provide that for a corporation to register or enroll vessels it must be organized under the laws of the United States or of a state, its president or other chief executive officer and its chairman of the board of directors must be citizens of the United States and no more than a minority of the number of directors necessary to constitute a quorum may be noncitizens.* These provisions are implemented by a whole array of Federal statutes.** The "American character" of a U.S. flag

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* For vessels engaged in the coastwise trade, 46 U.S.C. §§ 802 and 883 impose the further requirement that the vessel owning corporation must be 75% owned by United States citizens.

** Those statutes implementing such provisions with respect to vessels enrolled and licensed for the fisheries include the following. Before enrollment, an officer or agent of the owning corporation must take an oath as to the qualifications of the owner and the absence of impermissible foreign interest. 46 U.S.C. §§ 19, 252; 46 C.F.R. §§ 67.21, 67.23. A licensed vessel is subject to forfeiture upon transfer, in whole or in part, to any noncitizen or nonresident. 46 U.S.C. § 325. Upon such a transfer the vessel loses the privileges of a vessel of the United States. 46 U.S.C. §§ 221, 325. If a corporation qualifies as a United States citizen under the less rigorous tests of 46 U.S.C. § 883-1 enabling such corporation to engage in a specially restricted coastwise trade, it is nevertheless prohibited from engaging in fishing. 46 U.S.C. § 883-1.

vessel is further assured by the United States citizenship requirements for the master, officers and crew. 46 U.S.C. §§ 221, 252, 672, 1132.

2. Necessity for approval of Department of Commerce before a noncitizen acquires a U.S. flag vessel.

With the enactment of §§ 9 and 37 of the Shipping Act, 1916, 46 U.S.C. §§ 808, 835, the nationality tests for the documentation of vessels have been buttressed by the requirement that the transfer to noncitizens of interests in a vessel under construction in the United States, documented in the United States or owned in whole or in part by United States citizens must be approved by the Secretary of Commerce. Under these provisions, the entry into the United States fisheries by noncitizens must prior to entry be reviewed by the Secretary of Commerce: if the noncitizens seek to purchase a controlling interest in a United States corporation engaged in the fisheries with U.S. flag vessels, that purchase must be approved; alternatively, if the noncitizens create a United States corporation qualified by virtue of its officers and directors to enroll vessels, the acquisition of U.S. flag fishing vessels by such corporation must be approved. Consequently, and notwithstanding the contentions of the Appellant to the contrary, the entry into the United States fisheries by noncitizens is in all cases subject to the control of the Secretary of Commerce.

Appellees' licenses were obtained only after hearings in the Department of Commerce which considered the effect of granting the licenses on "(a) conservation and management of the fisheries resources, (b) the employment of U.S. citizens, (c) U.S. consumers, (d) competition and (e) other social and economic factors." 38 Fed. Reg. 29239-40 (1973). Certainly this Federal process was not followed only to be nullified at the option of a state.

3. Effect of the Bartlett Act on the U.S. fishery.

The policy of licensing for fishing in United States waters of U.S. flag vessels that meet the nationality tests

of the enrollment and licensing statutes and the Shipping Act, 1916, 46 U.S.C. §§ 808,835, was restated in the Bartlett Act, 16 U.S.C. § 1081, enacted in 1964. The Bartlett Act had the sole purpose of clarifying and, more importantly, enforcing the provision of 46 U.S.C. § 251(a) providing that licensed U.S. flag fishing vessels "and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the . . . fisheries." H.R. Rep. No. 1356, 88th Cong., 2d Sess. (1964); S. Rep. No. 500, 88th Cong., 1st Sess. (1963). Section 1081 provides, in part, that:

> "It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . . ."

The Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-82, repeals the Bartlett Act as of March 1, 1977, but in Section 307, 16 U.S.C. § 1857, substitutes a provision which even more clearly than the Bartlett Act applies to all Virginia waters:

> "It is unlawful —
>
> . . . .
>
> (2) for any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States, to engage in fishing —
>
> (A) within the boundaries of any State; . . . ."

Under Section 307 the authority of U.S. flag fishing vessels to fish in waters of the United States unmistakeably applies to any navigable waters within a state and is not limited to ocean waters within three miles of the coast.

Appellant attempts to treat the Bartlett Act as being merely a prohibition of fishing by foreign vessels. The Court below correctly thought differently. The Bartlett

Act, in conjunction with the statutes providing for enrolling and licensing of U.S. flag vessels, clearly demonstrates a Congressional intention to deny any right of foreign flag vessels and confirm the right of U.S. flag vessels to fish in United States waters. Otherwise valid state laws subjecting U.S. flag fishing vessels to regulation in their manner of operation or with respect to matters not treated by the licensing statutes, would not be invalidated by the Bartlett Act and the Fishery Conservation and Management Act of 1976. However, when as here, the state law purports to "regulate" matters comprehensively treated by the Federal licensing statutes, such inconsistent state laws cannot remain in effect.

The enrollment and licensing statutes, developed as described above over a long period of time, buttressed by the approval requirements of the Shipping Act, 1916, and clarified and reinforced by the Bartlett Act and the Fishery Conservation and Management Act of 1976, constitute a comprehensive system of Federal law that forecloses any state effort to prescribe nationality tests for fishing by U.S. flag fishing vessels. The Virginia citizenship statute must, therefor, fail.

C. The Virginia citizenship statute (Section 28.1-81.1) improperly intrudes into the Federal domain of international affairs.

It his repeatly been recognized by this Court that the conduct of this nation's foreign affairs is the exclusive province of the Federal government. *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *United States* v. *Pink*, 315 U.S. 203 (1942); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941). In *Zschernig*, this Court invalidated a state's escheat laws where such laws had more than a mere "incidental or indirect effect in foreign countries." In *Hines*, this Court invalidated a state's system for alien registration in the

face of an analogous Federal system and, after citing Article VI of the Constitution, stated:

> "The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." 312 U.S. at 63 (footnotes omitted).

Section 28.1-81.1 of the VIRGINIA CODE (1950), as amended, by prohibiting fishing in Virginia by U.S. flag vessels owned by corporations whose stock in turn is owned by aliens, directly and immediately affects United States foreign relations and conflicts with stated foreign policy objectives of the Federal government: it invites retaliation against United States fishing activities abroad, it jeopardizes the nation's ability to achieve freedom of international investment, and it impedes the nation's efforts to promote international fishery conservation.*

The drastic effect of the Virginia statute is fully demonstrated by statements before the House of Representatives Subcommittee on Merchant Marine in connection with H.R. 17048, 93rd Cong., 2d Sess. This bill was nearly iden-

* The sensitivity of the Federal government to these matters as they apply to foreign ownership of United States flag fishing vessels is shown by the final policy of NOAA regarding review of applications for transfer of U.S. flag vessels to foreign ownership. Among the matters NOAA considers are the United States policy on foreign investment and the effectiveness of international fishery conservation programs. 39 Fed. Reg. 33813 (1974).

tical in effect to the Virginia statute, except that it would have been of nationwide application, and was introduced, as described in the Statement of the Case, at the request of Seacoast's competitor Zapata after the transfer of Seacoast's and Smith Meal's fishing vessels was approved by the Department of Commerce. An official of the Treasury Department described how the bill's requirement for 75% ownership by United States citizens of the stock of corporations owning U.S. flag fishing vessels would be detrimental to the national objective of fostering liberalized regulation of international investment:

> "U.S. policy regarding international investment stresses reliance on market forces in the world economy and a desire to minimize restrictions. A two-way flow of investment between the United States and other nations can benefit all parties, and any attempt by the United States to impose restrictions on foreign investment would be detrimental to our economic interests. It is important to note that the United States has over $107 billion of direct investment abroad, compared to foreign direct investments in this country of $18 billion. The example we set in allowing foreign investment to come into the United States can significantly influence the attitudes and policies of other countries toward our investments. Enlightened self-interest requires that we continue to follow a policy of hospitality toward foreign investment rather than reverse our position." Statement of John A. Bushnell, Deputy Assistant Secretary of the Treasury, before the House of Representatives Committee on Merchant Marine and Fisheries, November 21, 1974, at 3.

Similarly, an official of the State Department showed that the bill would impair the national efforts of promoting both liberalized international investment and conservation of fishery resources:

> "I want to emphasize the importance of the implications of this legislation for our foreign policy. U.S.

leadership has been instrumental in maintaining liberal international trade and investment relations, relations which we view as particularly vital in this period of international economic crisis. Passage of this legislation would reduce our credibility with other nations on this issue, and would encourage other nations to engage in similar protectionist practices. In this regard, it should not be forgotten that the United States is the world's largest source of international investment flows and that a return to widespread restrictions on such investment would be most detrimental to our interests.

With specific reference to fishing, this could limit and prejudice important options available to the American fishing industry off foreign coasts as they attempt to adjust to problems that arise in connection with the establishment of a 200-mile economic zone in a Law of the Sea Treaty. Moreover, enactment of the legislation may prejudice our efforts to achieve agreement of other governments to our objectives with respect to control of salmon, and may intensify the opposition to our position on anadromous species in the Law of the Sea negotiations." Statement by Richard J. Smith, Director, Office of Investment Affairs, Department of State, before the House of Representatives Committee on Merchant Marine and Fisheries, November 21, 1974, at 3.

The Virginia statute would, without more, undoubtedly be constitutionally objectionable as an interference in foreign affairs. It is doubly objectionable, however, because of Federal legislation affecting the foreign affairs areas into which the Virginia statute has intruded.

Federal laws regulating investment by foreigners in U.S. flag fishing vessels, has been described above in detail. In addition the Federal government has made, by legislation and treaty, elaborate provisions regarding the international relations aspects of fishery conservation. In the

Submerged Lands Act, Congress specifically provided for Federal retention of all rights relating to international relations, 43 U.S.C. § 1314(a). The Bartlett Act, 16 U.S.C. §§ 1081-85, and the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-82, contemplate international agreement regarding fishing. The legislative history of those statutes shows that they were enacted in the context of this nation's foreign relations policy with due Congressional deliberation on the ramifications of such regulations on international relations. H. R. REP. No. 1356, 88th Cong., 2d Sess., at 7-8 and S. REP. No. 94-416, 94th Cong., 1st Sess., at 5-17, respectively. In addition to such legislation, the United States has entered into numerous treaties and other agreements with other nations relating to fishery regulation. The Senate Report relating to the Fishery Conservation and Management Act of 1976 cites twenty-two such agreements. S. REP. No. 94-416, *supra,* at 11.

In view of the Federal government's comprehensive actions directly affecting the conduct of foreign affairs, "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the Virginia statute is preempted by the Federal scheme, even if Virginia would otherwise have power to enact such legislation and even if the Virginia statute otherwise merely supplemented the Federal scheme. *Hines* v. *Davidowitz,* 312 U.S. 52, 66-67 (1941).

II

The Virginia Citizenship Statute (Section 28.1-81.1) and the Nonresident Statute (Section 28.1-60) Violate the Equal Protection Clause of the Fourteenth Amendment.

A. The citizenship statute (Section 28.1-81.1).

This Court has repeatedly struck down state legislation discriminating against aliens as violative of the Equal

Protection Clause. *Truax* v. *Raich,* 239 U.S. 33 (1915). In *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948), this Court held that a state law that "banned issuance of [fishing] licenses to any 'person ineligible to citizenship,' " 334 U.S. at 413, violated the Fourteenth Amendment.* *Graham* v. *Richardson,* 403 U.S. 365 (1971), invalidated restrictions relating to the ability of aliens to receive welfare. *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), struck down a state statute barring aliens from working in a state's civil service. *In re Griffiths,* 413 U.S. 717 (1973), invalidated a state's requirement that members of the bar be citizens. *Examining Board of Engineers, Architects and Surveyors* v. *Otero,*—U.S.—, 44 U.S.L.W. 4890 (June 16, 1976), invalidated a Puerto Rican statute that effectively barred aliens from practicing as civil engineers.

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* The Appellant's assertion that *Takahashi* was "occasioned by the racial overtones of the questioned statute and the Court's uncertainty of state ownership of marginal sea fisheries," Brief of Appellant, is misplaced. First, as the *Takahashi* Court stated with regard to the "racial overtones":

> "The state's contention that its law was passed solely as a fish conservation measure is vigorously denied. The petitioner argues that it was the outgrowth of racial antagonism directed solely against the Japanese, and that for this reason alone it cannot stand. We find it unnecessary to resolve this controversy concerning the motives that prompted enactment of the legislation. Accordingly, for purposes of our decision we may assume that the code provision was passed to conserve fish in the California coastal waters, or to protect California citizens engaged in commercial fishing from competition by Japanese aliens, or for both reasons." 334 U.S., at 418 (citations omitted).

Second, the *Takahashi* Court also had no occasion for uncertainty about fish "ownership".

> "To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." 334 U.S. at 421.

In *Otero* this Court reiterated the standards relating to discrimination against aliens established by the series of cases.

> "In examining the validity of Puerto Rico's virtually complete ban on the private practice of civil engineering by aliens, we apply the standards of our recent decisions in *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Sugarman* v. *Dougall,* 413 U.S. 634 (1973); and *In re Griffiths,* 413 U.S. 717 (1973). These cases establish that state classifications based on alienage are subject to 'strict judicial scrutiny.' *Graham* v. *Richardson,* 403 U.S., at 376. Statutes containing classifications of this kind will be upheld only if the State or territory imposing them is able to satisfy the burden of demonstrating 'that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.' *In re Griffiths,* 413 U.S., at 721-722 (footnotes omitted)." 44 U.S.L.W. at 4899.

The Court then noted that, with respect to restrictions on aliens engaging in private enterprises and occupations that are otherwise lawful,

> "... [T]he States have had the greatest difficulty in persuading this Court that their interests are substantial

Finally, the *Takahashi* Court distinguished the discriminations upheld in *Terrace* v. *Thompson,* 263 U.S. 197 (1923), and *Porterfield* v. *Webb,* 263 U.S. 225 (1923), relating to land ownership and cited by the Appellant as instances of the "right of the states to determine that property held in trust for the citizens of the state could be reserved for use by U.S. citizens exclusively." Brief of Appellant at 30. The Court noted:

> "This leaves for consideration the argument that this law should be upheld on authority of those cases which have sustained state laws barring aliens ineligible to citizenship from land ownership. Assuming the continued validity of those cases, we think they could not in any event be controlling here. They rested solely upon the power of states to control the devolution and ownership of land within their borders, a power long exercised and supported on reasons peculiar to real property. They cannot be extended to cover this case." 334 U.S. at 422 (footnotes omitted).

> and constitutionally permissible, and that their discrimination is necessary for the safeguarding of those interests." 44 U.S.L.W. at 4900.

The Court went on to hold that even with respect to public employment and the distribution of public resources:

> "In each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." 44 U.S.L.W. at 4900.

From *Otero* and other recent alien discrimination cases in this Court, it is clear that the Virginia citizenship statute violates the Equal Protection Clause.*

1. The Virginia citizenship statute contains a suspect classification.

By its terms, the Virginia citizenship statute discriminates against aliens by refusing them licenses for fishing. The argument by the Appellant that the "higher standard of review [required for legislation discriminating against individual aliens] is not demanded here, where the Appellees are foreign-owned corporate entities," Brief of Appellant at 24, and the argument by *Amici* in the Competitor's brief, at 29, that "[o]nly in cases where *individual* rights are concerned has a majority of this Court deemed it necessary to apply a higher standard of review to laws classifying in terms of alienage," ignore the fact that the Virginia citizenship statute effectively blocks fishing by corporations formed by alien individuals. As this Court reasoned in rejecting an argument that a treaty promoting

* See, for example, *Hampton* v *Mow Sun Wong,* —— U.S. ——, 44 U.S.L.W. 4737 (June 1, 1976), holding unconstitutional a U.S. Civil Service Commission regulation which barred resident aliens from employment in the Federal competitive civil service.

free trade did not extend to the formation of corporations by subjects of the foreign country:

> "It would be difficult to select any single agency of more universal use or more generally recognized as a usual and appropriate means of carrying on commerce and trade than the busines corporation. And it would, we think be a narrow interpretation indeed which, in the absence of restrictive language, would lead to the conclusion that the Treaty had secured to citizens of Japan the privilege of engaging in a particular business, but had denied to them the privilege of conducting that business in corporate form." *Jordan* v. *Tashiro,* 278 U.S. 123, 130 (1928).

The Virginia citizenship statute by its terms discriminates against aliens, a classification requiring strict judicial scrutiny of whether the governmental interest asserted is legitimate and substantial and whether the means adopted to protect that interest are necessary and precisely drawn.

2. The Virginia citizenship statute is neither necessary nor precisely drawn and has no reasonable basis.

The rationales suggested by the Appellant and the *Amici* in the Competitor's brief do not support the necessary and precisely drawn test established by *Otero* and its predecessors. The Virginia citizenship statute is neither necessary for promoting fishery conservation nor precisely drawn to effectuate that purpose constitutionally. Valid conservation regulations such as requirements as to net mesh size can be and have been established by the state and have a clear effect on conservation. Total exclusion of aliens, on the other hand, would not protect against overfishing by citizens. Hence, the Virginia citizenship statute is not only unnecessary, given the readily available, less restrictive alternative forms of regulation, but is also useless as a conservation measure. By the same token, the Virginia citizenship statute is not precisely drawn: it excludes all aliens whether having a

self-interest in conservation or not. In sum, then, the Virginia citizenship statute sweeps too broadly to survive the test established by *Otero.*

Appellant and *Amici* in the Competitor's brief do not try to justify the Virginia citizenship statute on the grounds that it is necessary and precisely drawn, but rather that it has a reasonable basis. Even by that test they are wholly unable to justify the statute. They argue that an alien-owned domestic corporation would overfish in Virginia until menhaden were depleted and then move on to exploit other waters, claiming that unlike citizen-owned corporations the alien-owned fishing companies would have no self-interest in conservation.

This Court recently has found similar "alien movement" justifications insufficient. In *Otero,* the ban on alien engineers was defended on the ground that it would "provide the client of a civil engineer an assurance of financial accountability if a building for which the engineer is responsible collapses. . . ." 44 U.S.L.W. at 4900. This Court held:

> "Finally, the asserted purpose to assure responsibility for negligent workmanship sweeps too broadly. United States citizenship is not a guarantee that a civil engineer will continue to reside in Puerto Rico or even in the United States, and it bears no particular or rational relationship to skill, competence, or financial responsibility. See *Sugarman* v. *Dougall,* 413 U.S., at 645; *In re Griffiths,* 413 U.S., at 724." 44 U.S.L.W. at 4900-4901.

Similarly in *Sugarman,* a state sought to justify its discrimination against hiring aliens for its civil service on the grounds that they would be "likely to remain only temporarily in a civil service position." 413 U.S. at 645. This Court held the justification unsupportable.

The purported justification based on alien-owned United States fishing corporations depleting and moving on is even

less rational than the "moving on" justifications advanced in *Sugarman* and *Otero*.

Seacoast represents an investment of in excess of $32 million by the foreign owners. The three largest menhaden fishing concerns each have extensive investments in ships, equipment and processing plants in various states. There is no rational basis, and certainly no evidence, to support a conclusion that alien-owned United States corporations such as Appellees would have any more reason to engage in irresponsible exploitation of the menhaden fishery in a specified area than would their citizen-owned competitors, given the similarity of their plant locations and the amount of their investments.

Unlike the foreign-flag fishing concerns, the alien-owned United States corporation is within the jurisdiction of the states for enforcement of fishing regulations, has property within the United States upon which judgments may be executed, and pays United States taxes, all just as if it were citizen-owned. There are in fact no relevant differences between alien-owned and citizen-owned United States corporations engaged in the menhaden fishery to warrant the discrimination between them based on stock ownership.

Section 28.1-81.1 should be recognized for what it is — protectionist legislation designed to exclude a major competitor without any justification acceptable in law. The effort to disguise the statute as an attempt to conserve the menhaden fishery is a sham. It does nothing more than it was designed to do — exclude the Appellees for the benefit of their Virginia based competitors. This classification cannot be sustained; the statute deprives Appellees of the equal protection of the laws.

B. The nonresident statute (Section 28.1-60) has no legitimate purpose or reasonable basis.

Virginia Code § 28.1-60 denies nonresidents the right to take menhaden in the Chesapeake Bay, thereby reserving

solely to residents of Virginia the exclusive right to fish in that area.

The validity of the discrimination practiced by the statute must be judged according to the standard established by this Court in *Toomer* v. *Witsell,* 334 U.S. 385 (1948).

In *Toomer,* nonresidents challenged a South Carolina statute which imposed a license fee on shrimp boats owned by nonresidents to be used in the state's coastal waters which was one hundred times the fee assessed residents' boats. The Court noted that the differential had the practical effect of virtually excluding nonresidents' boats. Thus, the impact on nonresidents was nearly identical to that of the Virginia statute. In finding the legislation unconstitutional under the Privileges and Immunities Clause, the Court employed an analysis equally applicable under the Equal Protection Clause:

> "It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with *whether such reasons do exist and whether the degree of discrimination bears a close relation to them.*" 334 U.S. at 396 (emphasis added).

The standard thus requires both a substantial reason for classifying nonresidents differently than residents and a degree of discrimination tailored to the differences which the two classes bear to the purpose of the statute.

Assuming that the South Carolina statute was a conservation measure, the Court found the state's argument that the nonresidents constituted "a peculiar source of

evil'', 334 U.S. at 398, wholly conclusory *and* an insufficient reason for excluding rather than regulating more closely those aspects of their operation which threatened the fishery.

> "In this connection appellees mention, without further elucidation, the fishing methods used by non-residents, the size of their boats, and the allegedly greater cost of enforcing the laws against them. . . . Nothing in the record [supports those statements]. . . . But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion.'' 334 U.S. at 398.

Appellant here makes the same argument, alleging solely on the strength of his own hypothesis that nonresidents are "a peculiar source of evil'' because of the state's claimed inability to enforce its net mesh size regulations against them. In *Toomer,* the Court pointed to the state's undoubted power to regulate the nonresidents' fishing practices and assess them a license fee compensating the state for any added cost of enforcing its laws as to their boats. It concluded in language appropriate to the present controversy:

> "We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the dangers represented by non-citizens, as a class, and the severe discrimination practiced upon them.'' 334 U.S. at 399.

Appellant's hypothesis that a nonresident commercial menhaden fisher is "less likely'' than a resident to comply voluntarily with state conservation measures is wholly unsupported by the record. Moreover, it is clearly inapplicable to the menhaden industry which is dominated by three national corporate fisheries, Seacoast, Zapata and Standard, two of which happen to have operations in Virginia. All

three are dependent on the survival of the resource in commercial quantities, in Virginia and elsewhere.

Appellant also argues that Virginia's ownership of the menhaden in the Chesapeake Bay gives it the right to reserve that fishery for residents under the authority of *McCready* v. *Virginia,* 94 U.S. 391 (1877). The Court held in *McCready* that a state may preclude nonresidents from planting oysters in the tidal waters of a stream because of its sovereign ownership of such waters and because the right in question was "a property right and not a mere privilege or immunity of citizenship.'' 94 U.S. at 395.

Appellant would have this Court equate the stream in *McCready* to the Chesapeake Bay, a body of water having a width in places of thirty miles, and equate planted oysters affixed to a river bed to free-swimming, migratory menhaden for purposes of determining the applicable law. This Court has unqualifiedly rejected any extension of *McCready* to migratory fish. The South Carolina statute invalidated in *Toomer* regulated fishing for shrimp, which are like menhaden in that they are free-swimming and migratory. In *Toomer,* the Court distinguished *McCready* and stated:

> "First, the *McCready* case related to fish which would remain in Virginia until removed by man. The present case, on the other hand, deals with free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily.'' 334 U.S. at 401.

Appellant also argues that *Toomer* is distinguishable since South Carolina's claim of ownership of shrimp in its coastal waters was considered questionable while Virginia's ownership of menhaden in inland waters such as the Chesapeake Bay is certain. Contrary to this contention, the Court in *Toomer* pursued two independent arguments and

concluded in each that *McCready* should not be extended. In one argument the Court accepted the state's ownership but found it insufficient.

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States." 334 U.S. at 402.

In *Edwards* v. *Leaver,* 102 F. Supp. 698 (D. R. I. 1952), a Rhode Island statute prohibiting nonresidents from taking menhaden in certain portions of the State's territorial waters, including Narragansett Bay and the Sakonnet River was held unconstitutional under the standard established in *Toomer.* The Court expressly rejected the argument made by Appellant here, that menhaden are analogous to oysters for the purpose of determining the degree of state ownership and that *Toomer* has no application to fish in inland waters. The Court stated:

> "Menhaden are free-swimming fish and as was pointed out in the *Toomer* opinion, the case of *McCready* v. *State of Virginia* . . . is clearly distinguishable on that fact.
>
> In view of the discriminatory character of this statute, we do not regard as important the fact that the area designated by the statute may be regarded as inland waters. The important fact is that menhaden are migratory fish. We hold, in accordance with the ruling of the *Toomer* case, that menhaden fishing in the designated area is within the purview of the privileges and immunities clause." 102 F.Supp. at 703.*

* Subsequent to *Toomer* this Court again rejected the applicability of the sovereign ownership theory to free-swimming fish in *Takahaski* v. *Fish and Game Commission,* 334 U.S. 410, 420-421 (1948).

In two recent Rhode Island decisions, Appellees obtained a temporary injunction against enforcement of a regulation which would have banned all vessels over 90 feet in length from catching menhaden in that state, *Apel* v. *Murphy,* Civ. Act. No. 75-210 (D.R.I. June 30, 1976), and obtained summary judgment invalidating a statute which prohibited nonresidents from taking fish from Rhode Island waters for the purpose of carrying them out of that state by boat, *Apel* v. *Murphy,* Civ. Act. No. 75-114 (D.R.I. July 28, 1976). In No. 75-210 the Court noted that all of Seacoast's vessels would be excluded since they exceed 90 feet in length but all Rhode Island based menhaden fishing vessels could comply with the regulation. In No. 75-114 all menhaden fishermen would be required to land in Rhode Island all their menhaden caught in Rhode Island, a state where Seacoast has no plant. In both cases the Rhode Island three-judge Court relied on *Toomer* v. *Witsell,* 334 U.S. 385 (1948), in granting the injunctions sought by Seacoast. The situation here with the Virginia statutes is clearly parallel and should compel the same result.

Moreover, this Court subsequently rejected the right-privilege dichotomy upon which *McCready* turned. The basis for the decision in *McCready* was that the planting of oysters in tidal waters owned by a state was considered a property right rather than a mere privilege. In *Graham* v. *Richardson,* 403 U.S. 365 (1971), the Court refused to recognize another "special public interest" of a state as an exception to the Equal Protection Clause and noted that the Court had rejected the right-privilege distinction.

> "Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahaski,* we conclude that [it is inadequate here]. First, the special public-interest doctrine was heavily grounded on the notion that '[w]hatever is a privilege, rather than a right, may be made dependent upon citizenship.' *But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'* " 403 U.S. at 374 (citations omitted; emphasis added).

Other residency statutes such as Section 28.1-60 uniformly have been held unconstitutional under the Privileges and Immunities Clause and the Equal Protection Clause. *Brown* v. *Anderson,* 202 F. Supp. 96, 101-102 (D. Alaska 1962); *Russo* v. *Reed,* 93 F. Supp. 554, 559-561 (D. Me. 1950); *Gospodonovich* v. *Clements,* 108 F. Supp. 234, 236-237 (E.D. La. 1951), *appeal dismissed,* 344 U.S. 911 (1953); *Commonwealth* v. *Westcott,* 344 N.E.2d 411, 412-413 (Mass. 1976), *cert. filed,* No. 75-1775 (June 7, 1976). State license fee legislation which discriminated without reason between residents and nonresidents was struck down in *Mullaney* v. *Anderson,* 342 U.S. 415, 417-418 (1952), and in *Steed* v. *Dodgen,* 85 F. Supp. 956, 958 (W.D. Texas 1949).

The Appellant has failed to demonstrate any valid reason for prohibiting nonresident commercial fishermen from pursuing menhaden on their migratory route through the Chesapeake. The purpose of the Virginia residence statute was simply to obtain and preserve an economic advantage for residents who obviously have more influence at the state legislature than their nonresident competitors. This effort to exclude competition is no justification for the denial of Appellees' rights to equal protection of the laws.

Appellant Douglas, Commissioner of Marine Resources, testified at his deposition that he did not know why nonresidents were barred from catching menhaden in Chesapeake Bay. (App. 66) However, Appellant now argues "Enforcement of the statute regulating net mesh size is virtually impossible as to non-resident fishermen since they do not land catches at Virginia ports. Dockside enforcement of the net regulations is the only effective method of enforcement."* Brief of Appellant, at 10.

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* VIRGINIA CODE § 28.1-65 makes it unlawful to use a net with a stretched mesh of less than one and three quarter inches. Other states also regulate net mesh size. (App. 99)

This contention falls far short of showing a reasonable basis for the discrimination. It should be evaluated in light of the following:

1. There is no requirement of dockside examination for net mesh size in any Virginia statute or regulation.

2. No proof was offered in the depositions or otherwise as to the alleged importance of dockside examination of net mesh size or that it even exists in practice.

3. In any event dockside enforcement would be meaningless because a Virginia corporation qualifying as a resident is not required to land its catch in Virginia but can take the catch to any plant outside of Virginia. As has been noted, *supra* p. 10, the major Virginia companies in the menhaden industry, namely Zapata and Standard, have a number of plants in states other than Virginia, including the neighboring states of Maryland and North Carolina.

4. Dockside inspection also would be meaningless as to net mesh size, because the Virginia statute makes illegal the "use," not the possession or ownership of stretched net meshes of less than one and three quarters inches. It does not even treat possession or ownership as prima-facie evidence of use.

5. It is commonly known that Virginia and other coastal states have small boats patrolling their coastal waters. The highly visible menhaden fishing fleet can be checked while their purse seines are in the water, just as oyster and crab fishermen are checked while fishing.

6. The net mesh size restriction as to menhaden originated in 1926 (Laws of Virginia, Acts of Assembly 1926, page 249) long after nonresidents had been excluded from fishing in Virginia waters.

In short, there is simply no relationship between prohibiting the catch of the smallest menhaden and the prohibition against fishing by nonresidents.*

It is clear that the Virginia statute preventing nonresidents from fishing in Chesapeake Bay has neither a legitimate purpose nor a rational basis. The classification is discriminatory and unconstitutional as found by the Court below.

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* The impropriety of the Virginia legislation preventing nonresidents from fishing in Chesapeake Bay also appears from the national standards for fishery conservation set forth in the Fishery Conservation and Management Act of 1976. Section 301 (16 U.S.C. § 1851) provides in part:

> "(a) IN GENERAL—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and managment:
>
> * * *
>
> (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges."

Although the foregoing standards are national standards specifically applicable *inter alia* to the fishery conservation zone, the principles as to the nature of appropriate management and conservation measures should be equally applicable to the three mile belt. Thus, any fishery management plan with respect to any fishery may "incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery," Section 303 (b)(5) of the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1853 (b)(5).

The report of the Senate Committee on Commerce on an earlier form of the Fishery Conservation and Management Act of 1976 stated, in part, with reference to the foregoing national standards:

> ". . . when allocation becomes necessary, it must be done judiciously and carefully to prevent discrimination or bias. Since there will be pressures on State representatives to protect the residents of their home State, nothing will destroy the effectiveness of this new management program than if one State, or group of States, attempts to favor their own residents to the detriment of others. If, for example, the most efficient area to catch fish during their migration is near the coast of Rhode Island, New Jersey fishermen should be allowed an equitable portion of the catch if they also fish the same stock." *S. Rep. No. 94-416, 94th Cong., 1st Sess., at 30.*

III

A State's Refusal to Grant a License to Take Fish in Local Waters to Classes of Persons Engaged in Interstate Commerce in Menhaden Constitutes an Unlawful Discrimination against Interstate Commerce.

Sections 28.1-81.1 and 28.1-60 of the VIRGINIA CODE (1950), as amended, deny Appellees the right to carry on the menhaden fishery in the Virginia marginal sea and the Chesapeake Bay, an important source of the menhaden fishery, solely on the basis of their ultimate alien control and nonresidence.

Menhaden constitute the largest fishery in the United States, contributing approximately 45 per cent of the annual aggregate commercial catch of United States fishermen. (App. 99)* Fishing for menhaden is commercially feasible only during their summer migration, when they move close to shore and through the contiguous inland waters of the coastal states. During that period they travel in large, closely-packed schools which the fishers pursue from state to state. Almost all menhaden are harvested within three miles of the coast. U.S. DEPT. OF COMMERCE, FISHERIES OF THE UNITED STATES, 1975, CURRENT FISHERIES STATISTICS No. 6900 (1976), at 18.

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* The interstate migratory character and commercial value of menhaden are discussed in Appellees' Statement of the Case.

Seacoast both fishes for and processes menhaden; Oceanic and Smith Meal furnish their catch to Seacoast for processing. The vessels operate from Seacoast's plants located in Port Monmouth, New Jersey, and Morgan City, Abbeville and Cameran, Louisiana. Seacoast also owns and operates terminals for fish meal in Delaware and Texas and a shipyard for repair of vessels in Louisiana. Thus, Appellees clearly are engaged in interstate commerce.

Appellant argues that §§ 28.1-81.1 and 28.1-60 do not impede such commerce in menhaden — they merely "regulate" the "local incident" by prohibiting Appellees from taking the fish. Thus, Appellant attempts to gloss over the fact that the classifications made by the two Virgina statutes effect a practical exclusion of an out-of-state competitor of local interests from the commerce of menhaden insofar as that commerce is dependent upon conducting a local activity.

Appellees have no quarrel with the decisions of this Court cited by Appellant to support the Virginia statutes. *Manchester* v. *Massachusetts,* 139 U.S. 240 (1891), and *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960), upheld *even-handed* local regulations not discriminatory against a class engaged in interstate commerce; *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), invalidated a regulation as applied to interstate railroads because it placed an undue burden on interstate commerce. These cases are of no help to Appellant.

In *Nippert* v. *Richmond,* 327 U.S. 416 (1945), the Court invalidated a fixed sum license tax upon the privilege of engaging in the business of solicitation as applied to representatives of a foreign corporation where, although the solicitation was local, the goods were to be shipped interstate. Responding to just the "local incident" argument made here by Appellant, the Court stated:

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax." 327 U.S. at 423.

The court in *Nippert* proceeded to evaluate the impact of the tax upon out-of-state solicitors as follows:

> "... [T]he Richmond tax imposes substantial excluding and discriminatory effects of its own. As has been said the small operator particularly and more especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, *with the result that the commerce is stopped before it is begun.*" 327 U.S. at 429 (emphasis added).

See *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 70, 72 (1963).

Far more clearly than the statute struck down in *Nippert,* the Virginia statutes prohibit certain classes of persons engaged in interstate commerce from performing an essential local function in the pursuit of such commerce. It is no argument that the act prohibited is local since the prohibition is of interstate commerce itself insofar as conducted by Appellees in the State of Virginia. The effectiveness of the Virginia statutes in protecting local economic interests from competition demands their invalidation.

> "Provincial interests and local political power are at their maximum weight in bringing about acceptance of

this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against." 327 U.S. at 434.

Economic protectionism in the guise of conservation has never been sustained by this Court where its focus was interstate. See *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923).

In *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U.S. 229 (1911), invalidating on Commerce Clause grounds an Oklahoma statute designed to reserve for local consumers natural gas produced within the State, the Court stressed the balkanization which such legislation would produce:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such a power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' " 221 U.S. at 255.

In *H. P. Hood & Sons* v. *Du Mond,* 336 U.S. 525 (1949), the Court held invalid as applied a New York statute authorizing the denial of a license to purchase milk upon an administrative determination that the granting of such license would be destructive of competition or would not otherwise be in the public interest. Plaintiff, a foreign corporation, distributed milk in Boston and was licensed in New York to operate three receiving depots for the

purpose of purchasing milk. Its application for a license to operate a fourth depot was denied.

The Court carefully distinguished the states' reserved power to regulate their internal commerce for the purpose of protecting public health, safety and welfare from the superior power lodged exclusively in the Federal government to regulate the interstate character of the economies of the several states.

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin* v. *Seelig,* 294 U.S. 541, 527, [sic] 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." 336 U.S. at 537-538.

The ultimate extension of the statute struck down in *H. P. Hood & Sons* is present in §§ 28.1-81.1 and 28.1-60 of the VIRGINIA CODE (1950), as amended, by which Appellant would "regulate" its fishery through the exclusion of Appellees. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928), involved such legislation. There, a statute which effectively precluded nonresident individuals and corporations from engaging in the taking of shrimp from Louisiana waters or participating in the canning and packing of the tail meat of the shrimp and the manufacture into fertilizer of the raw shells, hulls and heads was held unconstitutional.

Considering the contention that the legislation was validly enacted under the state's power to regulate and control

its fisheries, the Court accepted the proposition developed in *Geer* v. *Connecticut*, 161 U.S. 519 (1896), that the state owned, in its soverign capacity, the shrimp found in its waters. It held, however, that in permitting its own citizens to harvest, process and transport interstate the shrimp found in its inland and coastal waters, the fish had been released from the trust in which the state held them and thus had become the subject of interstate commerce.

> "In determining what is interstate commerce, courts look to practical considerations and the established course of business. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a state statute that operates directly to burden any of its essential elements is invalid." 278 U.S. at 10 (citations omitted).

The Virginia statutes restrict the economic benefits of the menhaden resource to some classes of interstate fishers and withhold it from other classes. In allowing the menhaden found in its waters to become the subject of interstate commerce, the state is prohibited by the Commerce Clause from discriminating among the interstate harvesters. As to those excluded from Virginia's fishery, the Virginia statutes constitute an attempt to halt interstate commerce before it has begun. *Nippert* v. *Richmond*, 327 U.S. 416 (1945); *Foster-Fountain Packing Co.*

Appellant cites *Toomer* v. *Witsell*, 334 U.S. 385 (1948), for the proposition that a state may prohibit the taking of its fish by certain classes of persons engaged in the interstate menhaden industry for the reason that such taking is a local incident. If that were the Court's holding, such would stand in stark contrast to the cases discussed above. However, in declaring unconstitutional the provision requiring

those taking shrimp to dock, unload, pack and place a tax stamp on their catch, the Court stated:

> "The record shows that a high proportion of the shrimp caught in the waters along the South Carolina coast, both by Appellants and others, is shipped in interstate commerce. There was also uncontradicted evidence that Appellants' costs would be materially increased by the necessity of having their shrimp unloaded and unpacked in South Carolina ports rather than at their home bases in Georgia. . . . In addition, an inevitable concomitant of a statute requiring that work be done in South Carolina, even though that be economically disadvantageous to the fisherman, is to divert to South Carolina employment and business which might otherwise go to Georgia; *the necessary tendency of the statute is to impose an artificial rigidity on the economic patterns of the industry.*" 334 U.S. at 403-404 (emphasis added).

The Court's holdings and reasoning in *Foster-Fountain Packing Co.* and *Toomer* place beyond dispute the proposition that Appellees are entitled to take menhaden in Virginia waters on an equal basis with those defined by that state as residents and citizens. State regulation of fish is not excepted from the scope of the Commerce Clause. Since the necessary effect of the Virginia statutes is to reserve the exploitation of the menhaden resources to local interests at the expense of Appellees as interstate harvesters and processors of menhaden, thus redefining the industry along state boundaries, the legislation is unconstitutional.*

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* See also *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1969); *Anderson* v. *Mullaney*, 191 F.2d 123 (9th Cir. 1951), *aff'd on other grounds*, 342 U.S. 415 (1952); *Seacoast Products* v. *Gormley, Civ. Act. No. 15796* (D. Conn. 1974); *Apel* v. *Murphy, Civ. Act. No. 75-210* (D.R.I. June 30, 1976); *Apel* v. *Murphy, Civ. Act. No. 75-114* (D.R.I. July 28, 1976).

IV

A Federal Court May Not Abstain from a Decision Where a State Statute Challenged as Unconstitutional Is Unambiguous and Federal Claims, Therefore, Do Not Turn upon an Unresolved Question of State Law.

In *Zwickler* v. *Koota,* 389 U.S. 241 (1967), the Court reviewed the doctrine of abstention in light of the purpose of the nineteenth century expansion of original federal judicial jurisdiction by Congress and the corresponding duty imposed on federal courts.

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility [to protect Constitutional rights]." 389 U.S. at 248.

In view of the statutory duty, the Court reasoned:

> "The judge-made doctrine of abstention . . . sanctions [abstention] only in narrowly limited 'special circumstances.' " 389 U.S. at 248 (citations omitted).

Those "special circumstances" were defined by the Court in *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971).

> "But the abstention rule only applies where 'the issue of state law is uncertain.' *Harman* v. *Forssenius,* 380 U.S. 528, 534. Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. *Reetz* v. *Bozanich, supra; City of Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U.S. 639." 400 U.S. at 438-439.

Considering the application of that doctrine to the statute before it, the Court concluded in language appropriate to the Virginia statutes in controversy here:

> "The Act on its face gives the chief of police the power to do what he did to the appellee. Hence the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional. As we said in *Zwickler* v. *Koota,* 389 U.S. 241, 251, abstention should not be ordered merely to await an attempt to vindicate the claim in a state court." 400 U.S. at 439.

Similarly, Appellees maintain that §§ 28.1-81.1 and 28.1-60(3) are unconstitutional on their face. Those statutes authorize Appellant to deny Appellees the right to fish in state territorial waters solely on the basis of alienage and nonresidence.

Appellees' challenge in a Federal court to unambiguous state statutes does not present an appropriate occasion for that court to abstain from decision.

> "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal court should stay its hand. . . ." *Wisconsin,* 400 U.S. at 439 (citation omitted).

CONCLUSION

Virginia cannot take away rights granted under Federal law. Appellees' vessels are duly enrolled in the U.S. fishery under the U.S. flag. They are subject to proper state conservation measures uniformly applied to all, but they may not be excluded from Virginia waters because

of alienage or nonresidence. The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John J. Loflin, Jr., a member of the Bar of the Supreme Court of the United States and one of the counsel for Appellees, in the above-captioned matter, hereby certify that three (3) copies of this Brief of Appellees have been served upon each counsel of record for the parties herein by depositing the same in the United States Postal Office with first class postage prepaid, this 20th day of August, 1976, as follows:

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